IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

THURSDAY, THE 24TH MAY 2007 / 3RD JYAISHTA 1929

CRP.No. 494 of 2006()

AGAINST THE COMMON ORDER IN IA 3727/06 & 3353/06 IN OS.1435/2001 of III ADDL.M UNSIFF & RENT CONTROL COURT, ERNAKULAM.

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REVN. PETITIONERS: PETITIONERS/DEFENDANTS 2 AND 3
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1. CLEETUS, S/O.SANDIVAU,
RESIDING AT IRUMPANATHU HOUSE,
OCHENTHURUTHU DESOM, PUTHUVYPE VILLAGE,
KOCHI TALUK.

2. JOY, S/O.SANDIAVU,
RESIDING AT IRUMPANATHU HOUSE,
OCHENTHURUTHU DEOSM,
PUTHUVYPE VILLAGE, KOCHI TALUK.

BY ADV. SRI.JOHN JOSEPH(ROY)

RESPONDENT/RESPONDENT/PLAINTIFF:

THAMPI,
AGED 58 YEARS,
S/O.VELU,
RESIDING AT THAIMADATHIL OCHENTHURUTHU DESOM,
PUTHUVYPE VILLAGE, KOCHI TALUK.

BY ADV. SRI.K.L.JOSEPH

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 24/05/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A. 1912 OF 2006
IN
C.R.P. NO.494 OF 2006

DISMISSED

24/3/07 **SD/- M.N. KRISHNAN, JUDGE.**

[True Copy]

P.A. TO JUDGE.

M.N. KRISHNAN, J.

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C.R.P. NO. 494 OF 2006

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Dated this the 24th day of May, 2007.

O R D E R

This revision petition is preferred against the common order passed in I.A.3727/06 and 3353/06 in O.S.1435/01 of the 3rd Addl. Munsiff Court, Ernakulam. The plaintiff's suit was dismissed for default for non-taking of steps. Later he moved an application for restoration of the suit wherein after tendering notice to the counsel appearing for defendants 2 and 3, the learned counsel appearing for defendants 2 and 3 endorsed that as the bundle is taken away notice may be issued directly to the parties. The trial court found that the notice served is sufficient and thereafter restored the suit on payment of costs of Rs.250/- payable within a period of 7 days from 16.11.05. Thereafter, the present revision petitioners moved an application for reviewing the order in I.A.8920/05 as I.A.3727/06 which was also dismissed by the Court below.

2. The bone of contentions raised are; (1) there has been no substantial compliance of the order regarding the payment of costs and 2) that the Court was erred in not issuing

notice to defendants 2 and 3 and any order passed behind their back is invalid and cannot be looked upon. So far as the first portion is concerned though there are different contentions it is finally settled by filing an affidavit by the writ petitioners before the Court on 30/3/07. It is stated in the affidavit, "since this Hon'ble High Court directed me to file an affidavit and I have personally verified the records of the trial court and it is found that a challan for Rs.250/- is filed before the Court dated 22.11.05. Hence, the averment in the affidavit of the respondent regarding regarding the remittance of costs is correct". So this will seal the contention raised by the revision petitioners regarding the non-payment of costs in time. Since the first revision petitioner himself has chosen to file an affidavit, I rely upon that and negative the first contention.

3. The crucial question to be considered is regarding the service of notice on the revision petitioners. When a counsel is appointed, provisions of the Code of Civil Procedure warrants that he shall continue the vakalath unless it is relinquished by him and by amendment by the High Court the proceedings in a suit will also take in an application under Order 9 Rule 9 and Order 9 Rule 13. The learned Munsiff on interpretation of Order 3 of C.P.C. and

the subsequent amendment made by the Kerala High Court, came to a conclusion that it is obligatory on the part of the counsel appearing to take notice in the application for restoration or setting aside the exparte decree. So, a mere endorsement will not suffice. If really there was difficulty for the counsel he should have entered appearance on that particular day and report no instructions so that the Court would have ordered direct notice. After appearing for the party, as per the provisions and rules, when a proceeding is initiated under Order 9 Rule 9 and under Order 9 Rule 13, the advocate cannot say that he cannot take notice for the party just because the bundle is given back. So, inaction on the part of the learned counsel on the day when the application for restoration came up for hearing by reporting 'no instructions' would only indicate that he had not taken any legal steps to terminate the vakalath and therefore he is under an obligation to accept the notice on behalf of the parties. Therefore, the said contention also cannot be accepted.

4. Lastly, the suit is restored to file and it is not the end of it. All the contentions raised by the parties have been looked into by the Court and what the Court desires to have is only a disposal on merits. As observed by this Court as early from 1969

onwards the brooding principles of natural justice demands that an opportunity should be given to the party unless it is found that he is grossly negligent or has committed grave mis-conduct. In this case, the Court below was convinced at the time of the restoration of the suit that there was no gross negligence or grave mis-conduct and therefore restored the suit. So, taking into consideration of all these principles, it was only correct on the part of the trial court to allow the application for restoration of the suit and therefore the order passed in I.A.8920/05 does not suffer from any infirmity and there was no mistake or any error apparent on the face of the record which warrants review of the said order. Therefore, the trial court was right in dismissing I.A.3727/06 and 3353/06 also. Therefore, the C.R.P. lacks merit and the same is dismissed.

M.N. KRISHNAN, JUDGE.

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